LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 15 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 495

MRS. KUNIKO HARAGUCHI WRIGHT,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PHILIP M. CARDEN,
216 Third Avenue North,
Nashville, Tennessee,

Attorney for the Petitioner.

Of Counsel:

THOMAS C. SINKLER,
300 Court Square Building,
300 James Robertson Parkway,
Nashville, Tennessee.

INDEX

Citations to Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provisions, Statutes and Regulations Involved 3
Statement of the Case 4
Reasons for Granting the Writ 9
Argument 10
I. The Power to Banish a Wife 10
1. Administrative Law 13
2. Statutory Law 14
3. Constitutional Law 16
II. Abuse of Discretion 18
Conclusion 11
Appendix—
Opinion of the Court of Appeals, June 22, 1967 . 21
Decision of the Board of Immigration Appeals, May 17, 1966 23
Decision of Special Inquiry Officer, February 11, 1966 25
Decision of Special Inquiry Officer on Motion to Terminate Proceedings, February 11, 1966 . 29
Relevant Portions of the Immigration and Nationality Act, 66 Stat. 163 30
Relevant Portions of the Immigration and Nationality Act—Amendments, Public Law 89-236; 79 Stat. 911 33
Relevant Portions of Regulations in Effect Prior to November 30, 1965, 8 C.F.R. § 206.1 36
Relevant Portions of Regulations Promulgated November 30, 1965, 30 Fed. Reg. 14775, 8 C.F.R. §.205.1 37

CITATIONS

Cases:

Boyd v. United States, 116 U.S. 616, 627 (1886) quoting *Entick v. Carrington*, 19 How. St. Trials 1029, 1066 (1765) 11

Immigration and Naturalization Service v. Errico, 385 U.S. 214, 225 (1966) 16

Kwock Jan Fat v. White, 253 U.S. 454 (1920) 19

Kwong Hai Chew v. Colding, 344 U.S. 590, 601-02 (1953) 16

Pereira v. Immigration and Naturalization Service, 342 F. 2d 422 (1st Cir. 1965) 9,11,12

Scalzo v. Hurney, 225 F. Supp. 560 (D. E.D. Pa. 1963), *aff'd* 338 F. Supp. 560 (D. E.D. Pa. 1963), *cert. denied* 382 U.S. 849 (1965) ... 10,12

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 14

United States ex rel. Stellas v. Esperdy, 366 F. 2d 266 (2nd Cir. 1966), vacated and remanded ... U.S. ..., 87 S.Ct. 2121 (1967) 11,12

United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 19

Constitutional Provisions:

Fifth Amendment 3

Thirteenth Amendment 3,17

Statutes:

Immigration and Nationality Act of 1952:
Section 101(a)(27)(A) (8 U.S.C. § 1101(a)-(27)(A)
(Amended Act § 201(b) (8U.S.C. §1151(b) Supp. I 1965)) 3,17

Section 205(a) (8 U.S.C. § 1155(a) (1964))
(Amended Act § 203(d) (8 U.S.C. § 1153(d)
Supp. I 1965)) 3
Sections 205(b) and (c) (8 U.S.C. §§ 1155(b)
and (c) (1964)
(Amended Act §§ 204(a) and (b) (8 U.S.C.
§ 1154(a) and (b) (Supp. I 1965)) 4,15
Section 206 (8 U.S.C. § 1156 (1964))
(Amended Act § 205 (8 U.S.C. § 1155 (Supp. I
1965)) 4,14
Sections 236(a) and (b) (8 U.S.C. §§ 1226(a)
and (b)) 4,14

Regulations:

8 C.F.R. § 206.1
(Replaced by 8 C.F.R. § 205.1, 30 Fed.
Reg. 14775 (Nov. 30, 1965)) 4,12,13,14

Miscellaneous:

Jevons, *Elementary Lessons in Logic* (1870)
(MacMillan's 1957 Reprint) p. 179 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. .....

MRS. KUNIKO HARAGUCHI WRIGHT,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The above-named petitioner prays that a writ of certiori issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered against her June 22, 1967, affirming an order of the Board of Immigration Appeals affirming an order of deportation.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, ... F. 2d ..., had not yet been published at the time this petition was prepared. It appears in the appendix hereto, *infra*, at pp. 21-22.

The administrative opinions have not been published. The decision of the Board of Immigration Appeals appears at pp. 1-3a of the certified copy of the petitioner's appendix below and in the appendix hereto, *infra*, pp. 23-24. The written decision of the special inquiry officer appears at pp. 6-10a of the petitioner's appendix below and in the appendix hereto, *infra*, pp. 25-28. The oral decision of the special inquiry officer on the petitioner's motion to terminate the proceedings appears at pp. 13-14a of the petitioner's appendix below and in the appendix hereto, *infra*, p. 29.

JURISDICTION

The judgment of the Court of Appeals was entered June 22, 1967.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a citizen husband be granted unrestricted power to terminate his alien wife's privilege of residence in the United States, once approved by the Attorney General, within the limitations of the Immigration and Nationality Act or consistently with the Fifth and Thirteenth Amendments to the Constitution of the United States?

2. If so, is it nevertheless an abuse of discretion for the Immigration and Naturalization Service to initiate deportation proceedings merely because of the failure of the alien's lawyer, because of sickness, to ask promptly for an extension of time offered by the Service for winding up then-pending divorce proceedings in a state court?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

I. *Constitutional Provisions*

The Fifth Amendment provides, in pertinent part:

"No person shall . . . be deprived of life, liberty or property, without due process of law . . . ."

The Thirteenth Amendment provides, in pertinent part:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

II. *Statute*

The statute involved is the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. §§ 1101-1503, both before and after the effective date of the 1965 amendments thereto, Public Law 89-236, 79 Stat. 911, with particular reference to the following sections, all of which are set out in the appendix hereto as indicated:

Section 101(a)(27)(A) of the original Act, 8 U.S.C. former § 1101(a)(27)(A) (1964), *infra*, p. 30, the subject matter of which is covered by § 201(b) of the amended Act, 8 U.S.C. § 1151(b) (Supp. I 1965), *infra*, p. 33.

Section 205(a) of the original Act, 8 U.S.C. former § 1155(a) (1964), *infra*, p. 30, the subject matter of which

is covered by § 203(d) of the amended Act, 8 U.S.C. § 1153(d) (Supp. I 1965), *infra*, p. 33.

Sections 205(b) and (c) of the original Act, 8 U.S.C. former §§ 1155(b) and (c) (1964), *infra*, pp. 30-31, the subject matter of which is covered by §§ 204(a) and (b) of the amended Act, 8 U.S.C. § 1154(a) and (b) (Supp. I 1965), *infra*, p. 34.

Section 206 of the original Act, 8 U.S.C. former § 1156 (1964), *infra*, pp. 31-32, the subject matter of which is covered by § 205 of the amended Act, 8 U.S.C. § 1155 (Supp. I 1965), *infra*, p. 35.

Sections 236(a) and (b) of the original Act, 8 U.S.C. §§ 1226(a) and (b) (1964), *infra*, pp. 31-32, which has not been amended.

III. *Regulation*

The regulation herein challenged is 8 C.F.R. former § 206.1, *infra*, p. 36, which has been replaced, with a significant addition, by 8 C.F.R. § 205.1, 30 Fed. Reg. 14775 (Nov. 30, 1965), *infra*, p. 37.

STATEMENT OF THE CASE

The petitioner, a citizen of Japan, while in the United States on a temporary visitor's visa, married an American citizen, Sergeant John Garrett Wright of the United States Air Force at Smyrna, Rutherford County, Tennessee. [19a, 29a] [1]

---

[1] Bracketed numbers followed by a small "a" refer to pages of the certified copy of the petitioner's appendix in the court below. Bracketed numbers designated "R" refer to pages of the certified administrative record filed in the Court of Appeals in response to the Petition for Review. Most of the facts set out in this statement appear in a verified letter appearing as part of Exhibit 4, which was admitted into evidence by stipulation at R. 27, 18a. The text of the letter appears at R. 42-51 and 27-35a.

Sergeant Wright petitioned on her behalf for non-quota immigrant status as the wife of an American citizen June 14, 1965, and the application was approved on June 17, 1965. [29a]

In support of what she considered unreasonable demands on her, Sergeant Wright repeatedly told her he could "make two telephone calls" and ship her back to Japan. [29-30a]

On July 13, 1965, the petitioner filed a petition for divorce *a mensa et thoro* in the Circuit Court of Rutherford County, Tennessee, alleging acts of mistreatment on the basis of which the Circuit Judge issued a protective injunction against the husband. [29a]

On July 29, 1965, the Immigration and Naturalization Service notified her that her non-quota status[2] had been ended because of her husband's withdrawal of the approved petition, and ordered her to depart by August 27, 1965. [29a]

Upon request of her then attorney, Mr. William C. Wright, the departure time was extended to October 27, 1965, to permit completion of divorce proceedings for which a hearing was then set for September 9, 1965, and the Respondent made it clear further extensions would be granted if necessary to complete the litigation. [25-26a, 31a]

Because of her husband's illness, the divorce hearing was postponed. [30-31a, 35a] It was further delayed later because of the illness of her attorney and the judge.

---

2 This characterization of the petitioner's status prior to withdrawal of her husband's petition appears in this record by way of paraphrase of the letter from the Respondent of July 29, 1965. Since this paraphrase was never challenged, the original letter was never introduced to show that the characterization was correct as a matter of administrative interpretation and practical fact, whatever technical distinction the Respondent may now wish to press upon the Court.

[32a, 35a] She relied upon her attorney to apply for any necessary extensions. [17a, 32a] Her attorney, however, because of his illness, failed to make such application. [32a] She was not even aware on October 27, 1965, that she had not been granted an extension. (20a, 32a]

On December 17, 1965, an order was issued against her to show cause why she should not be deported, the only charge being that she had remained past October 27, 1965. [22-23a] Because her attorney was then still confined by illness, she retained different counsel to represent her in the deportation proceedings. [18a, 27a]

Her new counsel submitted the above facts, fully verified, to the appropriate officer of the Respondent and requested that the order to show cause be withdrawn and that the petitioner be restored either to the status she held before July 29, 1965, or to the visitor's status she held before October 27, 1965, at least until completion of the divorce proceedings. [27-35a]

The letter made three principal points:

(1) That the petitioner had gained and still retained under applicable statutes a status as the resident spouse of an American citizen. [28a]

(2) That the petitioner's husband had misused the processes of the Service in attempting to terminate that status and that action on his attempted withdrawal should have been postponed pending outcome of the State domestic relations case. [29-30a]

(3) That even if petitioner's status had properly been returned to that of temporary visitor, it would be a proper exercise of discretion to grant a further extension of time without deportation proceedings based upon her attorney's

failure to ask an extension the Respondent had all but granted in advance. [31-32a]

Relief was denied without prejudice to the petitioner's right to ask similar relief from the Special Inquiry Officer. [26a]

At the deportation hearing February 11, 1966, the petitioner filed a written motion to terminate the proceedings and for the following relief in the alternative:

> "1. For reopening of the petition heretofore filed and approved for an adjustment of her status to that of non-quota immigrant as the spouse of an American citizen for reconsideration of the District Director's action on her husband's attempted withdrawal of that petition.
>
> "2. For a new adjustment of status.
>
> "3. For an extension of the time allowed her to remain in this country under her original visitor's visa." [24a]

In support of the motion she offered to prove the same facts previously set out in her counsel's verified letter to the District Director. [24-25a] The motion concluded:

> "In summary, she contends that but for her husband's attempted abuse of the Service's processes she would not have been subjected to an order to depart on a date certain, and but for her attorney's illness no occasion even then would have arisen for issuance of the show cause order.
>
> "WHEREFORE, she respectfully requests that the deportation proceedings be terminated and that her status be ordered to revert to that she enjoyed either prior to July 29, 1965, or to that she enjoyed prior to October 27, 1965."

The Special Inquiry Officer summarily denied the motion without hearing a response, argument or proof thereon, holding that:

> ". . . the beneficiary of the visa petition, as I understand the law has no standing to object because it is not her petition. It is the petitioner's petition. He has the right to withdraw it, and under our regulations in Title 8, Code of Federal Regulations, such a withdrawal may be made, and even if the petition had already been approved, the approval may be revoked." [13a]

After introduction of evidence, including the verified letter heretofore referred to, the Special Inquiry Officer ruled that the petitioner was deportable because she stayed beyond October 27, 1965, without regard to any extenuating circumstances, and ordered her deported.[3] [6-8a, 10a]

The petitioner perfected an administrative appeal from the deportation order, renewing all contentions made in her motion to stay the proceedings. [4-6a] In her supporting brief [R. 5-11], she specifically invoked the Fifth and Thirteenth Amendments [R.7, 8] and also invoked administrative discretion to excuse the technical violation with which she was charged on the uncontradicted showing that the violation was without fault or intent on her part. [R. 8-11]

The Board of Immigration Appeals dismissed the appeal in an opinion that did not mention either the extenuating circumstances relevant to the specific charge

---

[3] The Special Inquiry Officer also denied a motion for voluntary departure which was made only upon the Officer's assurance that it would be without prejudice to other issues. [21a] No appeal was taken from this portion of the order.

against the petitioner or the constitutional questions raised. [1-3a] The only defensive issue discussed was the challenge to the citizen husband's unrestricted power to revoke his alien wife's status, and the Board specifically approved this power, citing "*Pereira v. Immigration and Naturalization Service*, and authorities cited therein; 342 F. 2d 422." [3a; *infra*, p. 24]

The petitioner then filed a timely petition for review in the United States Court of Appeals for the Sixth Circuit, raising again the constitutional, statutory and administrative discretion issues. [See certified petition as amended.]

The Court of Appeals did not mention the involuntary servitude question, the statutory construction question or any of the extenuating circumstances relating to the question of administrative abuse of discretion. It barely mentioned the due process question as being "without merit."

On the only issue discussed, the court said:

> "A citizen who files a visa petition has a right to withdraw it and upon notice of withdrawal to the Service, revocation of approval is automatic. This result follows logically because it was the citizen's petition which was approved in the first place. The regulations do not provide for a hearing on either the approval or revocation of a petition." [*Infra*, p. 22]

REASONS FOR GRANTING THE WRIT

1. The power conferred on the petitioner's husband in this case is the power to order his wife banished beyond the seas for any reason or for no reason and to have his order enforced by the full majesty of the United States of America without hearing, question or remonstrance.

The question whether the Attorney General of the United States has, or can have, authority to delegate such arbitrary powers is an important question of federal constitutional and statutory law that has not been, but should be, settled by this Court.

Otherwise the importation of house slaves under color of matrimony can proceed apace unfettered by the Thirteenth Amendment, the Fifth Amendment, or the hearing procedures provided by Congress for the exercise of all powers it has granted to change the status of aliens in this country.

2. In refusing to consider, or to require the administrative officers involved to consider, the facts of record without dispute that the technical violation charged against the petitioner was both unintentional and without fault, the court below so far departed from the settled course of judicial proceedings, and so far sanctioned such a departure by the administrative tribunals, as to call for an exercise of this Court's power of supervision.

ARGUMENT

I. *The Power To Banish a Wife*

Not only the facts of this case, but those of the three cases cited by the court below establish that the power granted to the husband here is the power to banish an unwanted alien spouse, and that every husband or wife similarly situated may exercise that power for any reason or no reason with the Respondent's blessings and obedience.

In *Scalzo v. Hurney*, 225 F. Supp. 560 (D. E.D. Pa. 1963), affirmed 338 F. Supp. 560 (D. E.D. Pa. 1963), cert. denied 382 U.S. 849 (1965), a husband succeeded in deporting his resident wife to Italy although the domestic

relations court having jurisdiction refused him a divorce and tried to prevent the deportation.

In *Pereira v. Immigration and Naturalization Service*, 342 F. 2d 422 (1st Cir. 1965), a wife succeeded in deporting her husband to Portugal, but there is no mention in the opinion of any collateral domestic relations litigation.

In *United States ex rel. Stellas v. Esperdy*, 366 F. 2d 266 (2nd Cir. 1966), vacated and remanded ... U.S. ..., 87 S.Ct. 2121 (1967), summary deportation of a husband to Greece at his wife's request was forestalled only by a writ of habeas corpus which resulted in rulings confirming the wife's power, and this Court's action in vacating and remanding apparently was at the instance of the Respondent on the basis of regulations having nothing to do with the present issue.

To use Lord Camden's words as quoted by this Court in relation to a much less arbitrary power:

> "'Such is the power and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.'"
>
> *Boyd v. United States*,
> 116 U.S. 616, 627 (1886) quoting
> *Entick v. Carrington*,
> 19 How. St. Trials 1029, 1066
> (1765)

The law that allegedly warrants the power in the present case is not at all clear. Indeed, the court below contented itself with a vague reference to unspecified "regulations" [4]

[4] The court below also purported to apply the laws of logic to the problem, but its statement included only the minor premise and conclusion of its syllogism. The unstated major premise seems to consist of an assumption of the very point in issue, which violates the most elementary laws of logic and constitutes a material fallacy the textbooks classify as petitio principii. See Jevons, Elementary Lessons in Logic (1870) (MacMillan's 1957 Reprint) p. 179.

supported by citation of the *Stellas*, *Pereira* and *Scalzo* cases above-mentioned. [*Infra*, p. 22]

Reference to the three cases cited fails to clarify the matter.

In *Scalzo*, the court relied upon the first two sentences of § 206 of the Immigration and Nationality Act as it stood prior to its 1965 amendment, 66 Stat. 181, 8 U.S.C. former § 1156, *infra*, p. 31, as authorizing the Attorney General to revoke approval of a petition retroactively to the date of approval. No notice was taken of the remainder of the section providing that such revocation should be ineffective unless notice is *communicated* to the beneficiary before he "commences his journey to the United States," and providing for a different procedure where the beneficiary does not receive such notice before commencing his journey.

In *Pereira*, the court cited the above statute and the *Scalzo* case, but apparently rested its decision on 8 C.F.R. former § 206.1(b)(1), *infra*, p. 36, as it stood prior to the 1965 revision, which provided that revocation of approval of a visa petition should be automatic if the petition should be withdrawn. The validity of "this determinative regulation" either was not questioned or the court ignored the question.

In *Stellas*, for the first time, both the regulation and the statutory section it purports to implement were considered in the same opinion at length, but again the last two sentences of section 206 were disregarded. The point considered was the requirement of the first sentence that the revocation be based on a finding by the Attorney General of "good and sufficient cause." The majority concluded that the Attorney General acted within the scope of that

authorization by finding in advance that revocation of a petition was "good and sufficient cause" in every case and promulgating the regulation, 8 C.F.R. former § 206.1(b)-(1). None of the cases cited or discussed in the majority opinion so held. The dissenting judge said, 366 F. 2d at 271, that:

> "Here is a case so violative of the fundamentals of due process that, in this day and age when courts seem greatly concerned with fair trial, the right to a hearing and a meaningful appellate review, *I simply cannot understand*, much less agree with, the results reached by the majority. The facts tell a story reminiscent of the 'due process' of the Middle Ages, the Star Chamber—even of the shanghaiing of seamen." [Emphasis supplied.]

Even such clarification as the majority opinion in *Stellas* might otherwise have brought to the legal question has been destroyed by this Court's action in vacating and remanding the case, although apparently on other grounds.

Thus, despite the square consideration of the issue by four courts of appeals and two district courts, and the presentation of the issue here by petitions for certiorari in two cases, the reported case law as it now stands fails to establish that "the law to warrant [the power to banish a wife] is clear in proportion as the power is exorbitant."

Indeed, the cases do little more than indicate the key sections of the regulations and statutes where the power, if it exists, may be found. And these sections, considered in either immediate or full context, fail to establish the power clearly, either as a matter of administrative law, of statutory law, or constitutional law.

1. *Administrative Law.* It is true that the regulation in question, 8 C.F.R. former § 206.1(b), read in isolation

and in light of its caption, provides for automatic revocation of approval upon the happening of certain events. However, the statute the regulation purports to implement specifically provides that the Attorney General's revocation should not become effective in certain situations, and an intent to issue automatic revocations that would be ineffective by the terms of the controlling statute should not be imputed to the draftsman of the regulation unless it should be absolutely necessary.

Fortunately, the Attorney General chose to clarify this point in revising the regulations on November 30, 1965—before the present deportation proceedings began—by inserting the statutory exception into the new automatic revocation provisions, 8 C.F.R. § 205.1, *infra*, p. 37. Under the new provisions revocation occurs automatically only "if any of the following circumstances occur before the beneficiary's journey to the United States commences," one of the circumstances being the withdrawal of the petition by the citizen spouse.

2. *Statutory Law.* As indicated above, former section 206 of the Act, *infra*, p. 31, from which the contested power allegedly came, specifically provided that revocation should be ineffective without communication to the beneficiary in the country of origin. If the beneficiary has already commenced his journey, Congress provided a different procedure by reference to §§ 235 and 236 of the Act. The latter section, *infra*, p. 31-32, provides the alien with a hearing procedure and right of appeal—with certain limitations approved by this Court for application only in *excluding* aliens at the threshold of this nation's territorial sovereignty. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

In *Mezei*, this Court specifically recognized that:

"It is true that aliens who have once passed through our gates, even illegally, may be expelled only after

proceedings conforming to traditional standards of fairness encompassed in due process of law." [Citing cases.]

It is hardly reasonable to impute to Congress an intent to require procedural protection at the threshold, where none was "due" in the constitutional sense, and to authorize the Attorney General to dispense with any hearing at all after the alien had "once passed through our gates."

Such a reading becomes even more unreasonable when the context is considered both before and after amendment.

The original Act, section 101(a)(27)(A), *infra*, p. 30, defined a "non-quota immigrant" to mean, among other things, "an immigrant who is . . . the spouse of a citizen . . . ."

The Attorney General had only a limited role in deciding whether to approve a petition claiming non-quota status under that definition. He was ***required*** to approve it "if he determines the facts stated in the petition are true and that the alien in respect of whom the petition is made is eligible for a non-quota status." § 205(c), *infra*, p. 30-31.

Under the 1965 amendments, there is even less room for interpretation. Section 201(b), *infra*, p. 33, provides that a spouse is an "immediate relative" and "immediate relatives . . . who are otherwise qualified for admission as immigrants ***shall be admitted as such***, without regard to the numerical limitations in this Act." [Emphasis supplied.]

And in amended § 204(b), *infra*, p. 34, there is no further talk of determining "eligibility." The Attorney General is now required to approve the petition if he determines the facts are true and the alien "is an immediate relative specified in section 201(b)."

Can the "good and sufficient cause" that will justify revocation of approval under former § 206 or present § 205 include factors other than those considered in granting approval?

"Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:

"'We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'" [Citing cases.]

Immigration and Naturalization Service v. Errico, 385 U.S. 214, 225 (1966)

3. *Constitutional Law.* In a case involving a returning voyager the Respondent sought to exclude, this Court said:

"His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him. Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing."

Kwong Hai Chew v. Colding, 344 U.S. 590, 601-02 (1953)

Since four courts of appeals have already assumed that Congress and the Attorney General did so intend with respect to persons in the petitioner's position, the Constitutional questions are extremely important, and ought to be settled by this Court.

That several serious due process questions are presented is quite evident, and no further authority than the cases already cited above should need to be considered on this petition. Counsel is not aware of any decision of this Court that authorizes the result here, even by analogy, under the due process clause, and the cases already cited tend to indicate the contrary.

But here an additional factor of serious constitutional dimensions is presented——involuntary servitude in violation of the Thirteenth Amendment.

The verified letter in evidence [27-35a], which has not been traversed and has been held, in effect, to be insufficient in law, includes the statement that "Sgt. Wright was apparently under the impression that he had acquired a slave rather than a wife, and he repeatedly told her in support of his unreasonable demands that he could 'make two telephone calls' and ship her back to Japan, and he repeatedly threatened to 'deport' her." [29-30a]

It is clear from the proceedings below that the threats were not idle, that the Respondent would make them good.

As things turned out, the petitioner didn't believe him or didn't object to being deported, or thought the Tennessee courts could protect her, and therefore involuntary servitude did not result——but deportation proceedings were the price of her resistance.

Can Congress delegate to a would-be slavemaster a power, to be enforced by officers of the United States,

that is so adaptable to enforcing involuntary servitude—which the Thirteenth Amendment says shall not exist?

And that without the slightest inquiry as to the use to be made of this power in the particular case?

II. *Abuse of Discretion*

If, as held by all of the tribunals below, the petitioner's status reverted retroactively upon her husband's whim to that of a visitor whose visa had expired, then she was then technically immediately deportable.

No deportation proceedings were initiated, however. Her first notice gave her 29 days to wind up her affairs and depart.

That unrequested extension expired on August 27, 1965, four days before an extension was granted on September 1, 1965, until October 27, 1965.

Clearly the Respondent's officers had authority to grant retroactive extensions.

They had authority to grant another extension when they learned that the purposes of the previous one had not been accomplished through no fault of the petitioner.

They chose instead to impose on her the drastic penalty of banishment by bringing an order to show cause that was technically true and technically a ground of deportation, but actually sought the imposition of a drastic penalty for her sick lawyer's default.

The respondent's officers undoubtedly have great discretion in granting and denying extensions of time for alien visitors, but no license can ever be granted to an administrative functionary to exercise bureaucratic tyranny with-

out reason or purpose. See *Kwock Jan Fat v. White*, 253 U.S. 454 (1920).

Nor can an administrative official refuse to exercise his discretion. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Here the record shows not the slightest evidence at any level, up to and including the United States Court of Appeals for the Sixth Circuit of any consideration of any factor relevant to the exercise of discretion in granting another retroactive extension of a visitor's visa.

At all levels, the matter was discussed as if the mere overstaying of the magic October 27 departure date was the only factor to be considered, and the petitioner's fault or lack of fault in overstaying was irrelevant.

This is not an exercise of discretion. It is a refusal to exercise discretion, and it so far departs from the usual course of administrative proceedings and appeals therefrom that it calls for the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, the petitioner contends certiorari should be granted to settle important issues of federal law that have not been, but should be, settled by this Court, and in the exercise of this Court's power of supervision over the administration of the Immigration and Nationality Act and appellate review thereof.

Respectfully submitted,

PHILIP M. CARDEN
216 Third Avenue North
Nashville, Tennessee
Attorney for the Petitioner

THOMAS C. BINKLEY
300 Court Square Building
300 James Robertson Parkway
Nashville, Tennessee
Of Counsel

Appendix

OPINION OF THE COURT OF APPEALS

FILED JUNE 22, 1967

Before: WEICK, Chief Judge, COMBS, Circuit Judge, and CECIL, Senior Circuit Judge.

PER CURIAM. Petitioner, a native of China but a citizen of Japan, was admitted to the United States as a visitor for pleasure for a six months' period. Shortly before the expiration of that period she married an American citizen. Her husband filed a petition with the Immigation and Naturalization Service to have her classified as a nonquota immigrant. The petition was approved.

Within a period of one month petitioner filed an action for divorce in the state court and her husband then withdrew the petition which he had filed to have her classified as a nonquota immigrant. The Service revoked its approval of the petition. Petitioner was notified that she would have to depart from the United States on or before a certain date and upon her failure to leave, deportation proceedings were instituted against her.

In the deportation proceedings petitioner was represented by counsel and after hearing, the deportation order under review here was issued.

It is claimed that petitioner acquired a status when the Service approved her husband's petition to classify her as a nonquota immigrant and that she was deprived of due process of law when her husband withdrew the petition and the Service revoked its approval without notice to her and without giving her an opportunity to be heard. In our opinion this contention is without merit.

An alien does not obtain a vested right upon approval of a visa petition. *Amarante v. Rosenberg*, 326 F. 2d 58 (9th Cir. 1964). A citizen who files a visa petition has a right to withdraw it and upon notice of withdrawal to the Service, revocation of approval is automatic. This result follows logically because it was the citizen's petition which was approved in the first place. The regulations do not provide for a hearing on either the approval or revocation of a petition. *United States ex rel. Stellas v. Esperdy*, 366 F. 2d 266 (2nd Cir. 1966); *Pacheco-Pereira v. Immigration and Naturalization Service*, 342 F. 2d 422 (1st Cir. 1965); *Scalzo v. Hurney*, 225 F. Supp. 560 (E.D. Pa., 1963), *aff'd* 338 F. 2d 339 (3rd Cir. 1964) *cert. denied* 382 U.S. 849.

The Special Inquiry Officer denied petitioner's application for voluntary departure and she advised the Board of Immigration Appeals that she was not appealing therefrom. The Service has discretion to stay the proceedings if the alien needs additional time to settle her business affairs. Counsel has advised us that a divorce has since been granted by the state court.

We find no abuse of discretion in the refusal of the Service to terminate the deportation proceedings.

The order of deportation is affirmed.

DECISION OF THE BOARD OF IMMIGRATION APPEALS

FILED MAY 17, 1966

The respondent, a 32-year-old married female, native and citizen of Japan, has resided continuously in the United States since her admission at Honolulu, Hawaii on or about January 13, 1965 as a nonimmigrant visitor until July 12, 1965. Deportation proceedings were instituted against the respondent on December 17, 1965. A hearing in deportation proceedings was held at Memphis, Tennessee on February 11, 1966. The Service in a communication dated September 1, 1965 granted the respondent until October 27, 1965 within which to effect her voluntary departure from the United States (Ex. 3). She has remained in the United States without authority since the latter date. The respondent and counsel admitted the truth of the factual allegations set forth in the Order to Show Cause (pp. 5 & 6). The evidence of record clearly establishes that the respondent is subject to deportation under the provisions of Section 241(a)(2) [2] of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of the Act, she remained in the United States for a longer time than permitted.

Counsel in oral argument asserted he is not appealing from the special inquiry officer's order denying voluntary departure. Counsel urged that the respondent be granted a stay of deportation until final action has been taken by the appropriate civil court on her petition for a divorce. The record reflects the respondent was married to a citizen of the United States on May 28, 1965. The facts detailing the respondent's conduct after separating from her

husband on July 10, 1965 and her filing a petition for a divorce in the Circuit Court of Rutherford County on July 13, 1965 as well as the remaining facts in this case have been fully and adequately covered by the special inquiry officer in his decision of February 11, 1966. The points raised by counsel on appeal relating to the withdrawal and revocation of the visa petition executed on her behalf by her citizen spouse are without merit. It has been held that an alien who married a United States citizen during stay as a visitor and whose spouse has requested withdrawal of the petition for a change in the alien's status to that of a nonquota immigrant prior to any action thereon by the Immigration and Naturalization Service had no personal right to become a nonquota immigrant and was deportable after leave to remain as a visitor expired. An alien in the respondent's position has no personal right to become a nonquota immigrant. The right lies in the citizen spouse. The alien does not acquire any vested right by the citizen spouse's filing of a visa petition and approval of the petition filed by the citizen spouse merely renders the alien spouse eligible for immigrant status (cf. *Pereira v. Immigration and Naturalization Service*, and authorities cited therein; 342 F.2d 422).

After carefully considering all the evidence of record, together with counsel's representations on appeal, we must on the basis of the evidence present therein affirm the decision of the special inquiry officer. The question of granting the respondent a stay of deportation [3] is solely a matter for administrative consideration and determination by the Service. For the reasons stated, the following order will be entered.

ORDER: It is ordered that the appeal be dismissed.

/s/ Thos. G. Finucane
Chairman

DECISION OF SPECIAL INQUIRY OFFICER

ENTERED FEBRUARY 11, 1966

The respondent is a 31-year-old married but separated female in whose case it was conceded by her counsel that she is an alien, a native of China and a citizen of Japan who entered the United States at Honolulu, Hawaii, on or about January 13, 1965, at which time she was admitted as a visitor for pleasure and was authorized to remain in the United States until July 12, 1965. It was also conceded that on September 1, 1965 she was authorized to depart from the United States on or before October 27, 1965, but that [13] she has remained in the United States beyond that date. Deportability on the charge contained in the order to show cause was not conceded because it was contended that a divorce action is pending against the respondent's husband and it was implied that she was permitted to remain in the United Stated beyond October 27, 1965.

Several documents were introduced into the record which indicate quite clearly that no such extension of departure time beyond October 27, 1965 was granted. As a matter of fact it was conceded that a letter was written to the respondent's then attorney saying that if additional time beyond that date, namely, October 27, 1965, should be necessary, request for such an extension could be submitted. There is absolutely no evidence that such a request was submitted and, as a matter of fact, there is no indication that a request was even made for an extension prior to the time the order to show cause was issued in this case, which was on December 17, 1965.

The respondent herself testified that she does not know if she got more time because she left all matters to her attorney who was then a Mr. Wright, and there is evidence of record to indicate that Mr. Wright did represent her. She testified that Mr. Wright represented her in these proceedings until January 1966, at which time she retained the services [14] of her present counsel who represented her at the hearing today. She was not aware that her attorney did not get an additional stay beyond October 27, 1965.

The evidence reflects clearly that the respondent was given until October 27, 1965 within which to depart from the United States, and there is no evidence that she got any additional time thereafter. She is, therefore, deportable on the charge contained in the order to show cause.

I hereby adopt the allegations and the charge in the order to show cause as my findings of fact and conclusion of law, respectively.

The respondent applied for voluntary departure in lieu of deportation. This was, of course, without prejudice to the claim that she is not deportable. The respondent asserted that she was never arrested, that she would be willing to depart within a reasonable time and indicated that the maximum time would be one month. She asserted that she has enough funds to pay her way out of the United States.

The evidence reflects very clearly that after her separation from her husband she had dates with some men, and she testified orally before me today and in a question and answer statement which is of record as Exhibit 5 she indicated that she had sexual intercourse with some of these men [15] even though she asserts that she received

no money for it. There is no allegation that she received any money for these sexual acts. She did, however, commit these sexual acts. She is, as has been emphasized by the respondent's attorney quite properly, still the wife of an American citizen. As such, when she had sexual relations with another man she has committed adultery. In view of the provisions of Section 101(f)(2) of the Immigration and Nationality Act, she is precluded as a matter of law from establishing that she has been a person of good moral character for the past five years, which is one of the requirements of Section 244(e) of the Immigration and Nationality Act, as amended, before voluntary departure can be authorized. In view thereof I find that the respondent has failed to establish that she has been a person of good moral character and must deny her request for voluntary departure and order her deportation.

The respondent has besides her husband her cousin's husband's family in the United States. Her parents and all of her other relatives reside in Japan. It is indicated in the record before me that there is now pending an action for a divorce from bed and board and not an absolute divorce from her husband. This is mentioned in passing.

Even if the respondent were statutorily eligible for voluntary departure, which she is not because she is precluded by law from establishing that she has been a person of good moral character for the past five years, as [16] is required by Section 244(e) aforesaid, there are factors in this case which would lead to a denial of the request as a matter of administrative discretion. The respondent, in her statement of December 14, 1965, which is of record as Exhibit 5, asserted that she entered the United States to get a job and work in this country but that she told the consul merely that she was going to the United States to visit for one week. If she had told the consul the truth,

she could not have been issued a visitor's visa and could not have been admitted as a visitor for pleasure if she had told the examining officer that she was coming in to work. Futhermore, she married her husband for the sole purpose of being able to remain in the United States and to avoid paying her fare back to Japan. This is very clear from her statement which is Exhibit 5 in the record. She asserted therein that she did not love him at the time of the marriage and, as a matter of fact, resided with him only a period of several months after the marriage, which took place on May 28, 1965, before they were separated.

The respondent elected Japan as the country to which she wishes to be deported in the event it is necessary to effect her deportation.

[17]ORDER: IT IS ORDERED that the respondent's application for voluntary departure in lieu of deportation be and the same is hereby denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Japan on the charge contained in the order to show cause.

/s/ Daniel J. Schrull
Special Inquiry Officer

DECISION OF SPECIAL INQUIRY OFFICER ON MOTION TO TERMINATE PROCEEDINGS

FEBRUARY 11, 1966

THE SPECIAL INQUIRY OFFICER: Very well, we will now consider this motion. The motion is entered of record and marked Exhibit 2. Without hearing what Mr. Jones may have to say about this, counsel, I must deny your motion because a visa petition can be [22] withdrawn by the person who submits it and the person who is the beneficiary of the visa petition, as I understand the law, has no standing to object because it is not her petition. It is the petitioner's petition. He has the right to withdraw it, and under our regulations in Title 8, Code of Federal Regulations, such a withdrawal may be made, and even if the petition had already been approved, the approval may be revoked. That being the case, your motion is denied in that respect. Now insofar as an extension is concerned, we already have an order to show cause and I have no authority to terminate so that she may apply for an extension of time in the United States if she is deportable. On the other hand, of course, if she is not deportable, then these proceedings would be terminated and we'd carry on from there. We are here to determine, first, whether the respondent is deportable, and if she is, what form of relief, if any, may be granted in her case. When we get to that point, after we finish the deportability angle, I will advise you of your rights on discretionary relief, so your motion to terminate the deportation proceedings at this time is denied.

RELEVANT PORTIONS OF THE IMMIGRATION AND NATIONALITY ACT

66 Stat. 163

"Section 101. Definitions

"(a) . . .

"(27) The term 'nonquota immigrant' means——

"(A) an immigrant who is the child or the spouse of a citizen of the United States; [66 Stat. 169]

" * * * *

"Sec. 205. (a) In the case of an alien claiming in his application for an immigrant visa to be entitled to a nonquota immigrant status under section 101(a)(27)(A), . . . the consular officer shall not grant such status or preference until he has been authorized to do so as provided in this section.

"(b) Any citizen of the United States claiming that any immigrant is his spouse or child and that such immigrant is entitled to a nonquota immigrant status under section 101(a)(27)(A) . . . may file a petition with the Attorney General. The petition shall be in such form and shall contain such information and be supported by such documentary evidence as the Attorney General may by regulations prescribe. The petition shall be made under oath administered by any individual having authority to administer oaths, if executed in the United States, but, if executed outside the United States, administered by a consular officer.

"(c) After an investigation of the facts in each case the Attorney General shall, if he determines the facts stated in the petition are true and that the alien in respect of

whom the petition is made is eligible for a nonquota immigrant status under section 101(a)(27)(A) . . . approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the nonquota immigrant status, quota immigrant status, or preference, as the case may be. [66 Stat. 180]

"* * * *

"Section 206. The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under . . . section 205 . . . of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 235 and 236. [66 Stat. 181]

"* * * *

"Section 236(a) A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an arriving alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the

inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions, or in which he shall have participated (except as provided in this subsection) in prosecution functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 235 and 287(b), and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

"(b) From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 235(c). From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as provided in section 235(c) such decision shall be rendered solely upon the evidence adduced before the special inquiry officer. [66 Stat. 200]

"* * * * *"

RELEVANT PORTIONS OF THE IMMIGRATION AND NATIONALITY ACT -- AMENDMENTS

Public Law 89-236; 79 Stat. 911

"Section 201 of the Immigration and Nationality Act (66 Stat. 175; 8 U.S.C. 1151) be amended to read as follows:

"'Sec. 201. . . .

"'(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: ***Provided***, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this Act. [79 Stat. 911]

"' * * *

"Sec. 3. Section 203 of the Immigration and Nationality Act (66 Stat. 175; 8 U.S.C. 1153) is amended to read as follows:

"'Sec. 203. . . .

"'(d) Every immigrant shall be presumed to be a non-preference immigrant until he establishes to the satisfaction of the consular officer and the immigration officer . . . that he is an immediate relative of a United States citizen as specified in section 201(b). In the case of any alien claiming in his application for an immigrant visa to be an immediate relative of a United States citizen as specified in section 201(b) . . . the consular officer shall

not grant such status until he has been authorized to do so as provided by section 204. [79 Stat. 914]

"' * * * *

"Sec. 4. Section 204 of the Immigration and Nationality Act (66 Stat. 176; 8 U.S.C. 1154) is amended to read as follows:

"'Sec. 204. (a) Any citizen of the United States claiming that an alien is entitled . . . to an immediate relative status under section 201(b) . . . may file a petition with the Attorney General for such classification. The petition shall be in such form as the Attorney General may by regulations prescribe and shall contain such information and be supported by such documentary evidence as the Attorney General may require. The petition shall be made under oath administered by any individual having authority to administer oaths, if executed in the United States, but, if executed outside the United States, administered by a consular officer or an immigration officer.

"'(b) After an investigation of the facts in each case, . . . the Attorney General shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) . . . approve the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status. [79 Stat. 915]

"' * * * *

"Sec. 5. Section 205 of the Immigration and Nationality Act (66 Stat. 176; 8 U.S.C. 1155) is amended to read as follows:

"' Sec. 205. The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 235 and 236.' [79 Stat. 916]

"Sec. 6. Section 206 of the Immigration and Nationality Act (66 Stat. 181; 8 U.S.C. 1156) is amended to read as follows: [79 Stat. 916]

"' * * * * *'

"Sec. 7. Section 207 of the Immigration and Nationality Act (66 Stat. 181; 8 U.S.C. 1157) is stricken." [79 Stat. 916]

"' * * * * *"

RELEVANT PORTIONS OF REGULATIONS IN EFFECT PRIOR TO NOVEMBER 30, 1965

Title 8, Code of Federal Regulations

"§ 206.1 Automatic revocation.

"The approval of a petition made under section . . . 205 . . . of the Act . . . is revoked as of the date of approval in any of the following circumstances:

" * * * *

"(b) Section 205. As to a petition approved under section 205 of the Act:

"(1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

"(2) Upon the death of the petitioner or beneficiary.

"(3) Upon the legal termination of the relationship of husband and wife when a petition has accorded status as the spouse of a citizen . . . under section 101 (a)(27)(A) . . . of the Act.

" * * * * "

RELEVANT PORTIONS OF REGULATIONS PROMULGATED NOVEMBER 30, 1965

30 Fed. Reg. 14775

Title 8, Code of Federal Regulations

"§ 205.1 Automatic revocation

"The approval of a petition made under section 204 of the Act . . . is revoked as of the date of approval if any of the following circumstances occur before the beneficiary's journey to the United States commences:

"(a) *Relative petitions.* (1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

"(2) Upon the death of the petitioner or beneficiary.

"(3) Upon the legal termination of the relationship of husband and wife when a petition has accorded status as the spouse of a citizen . . . under section 201(b) . . . . ."

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute and regulation involved	1
Question presented	3
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Amarante v. *Rosenberg*, 326 F. 2d 58 — 8

Immigration and Naturalization Service v. *Errico*, 385 U.S. 214 — 9

Mantyk v. *Sahli*, 161 F. Supp. 199 — 10

Pacheco Pereira v. *Immigration and Naturalization Service*, 342 F. 2d 422 — 10

Scalzo v. *Hurney*, 225 F. Supp. 560, affirmed *per curiam*, 338 F. 2d 339, certiorari denied, 382 U.S. 849 — 8, 10

United States ex rel. Stellas v. *Esperdy*, 366 F. 2d 266, vacated and remanded on other grounds, June 12, 1967, No. 934 Misc., O.T., 1966 — 8

Statute and regulation:

Immigration and Nationality Act of 1952, as amended:

Sec. 101(f)(2), 8 U.S.C. 1101(f)(2) — 5

Sec. 201(b), 8 U.S.C. (Supp. II), 1151(b), formerly Sec. 101(a)(27)(A), 8 U.S.C. 1101(a)(27)(A) — 7

Sec. 204, 8 U.S.C. (Supp. II) 1154, formerly Sec. 205, 8 U.S.C. 1155 — 2, 3, 6, 10

Sec. 205, 8 U.S.C. (Supp. II) 1155, formerly Sec. 206, 8 U.S.C. 1156 — 1, 6, 10

Sec. 241(c), 8 U.S.C. 1251(c) — 10

Statute and regulation—Continued

	Page
Immigration and Nationality Act of 1952—Continued	
Sec. 241(f), 8 U.S.C. 1251(f)	9
Sec. 244(e), 8 U.S.C. 1254(e)	5
Sec. 245, 8 U.S.C. 1255	7
8 C.F.R. 205.1(a)	2
8 C.F.R. (1965 rev.) 206.1(b)(1)	2, 3, 6, 10

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 495

KUNIKO HARAGUCHI WRIGHT, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. 21–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1967. The petition for a writ of certiorari was filed on August 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

Section 205 of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. (Supp. II) 1155, provides:

> The Attorney General may, at any time, for what he deems good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition. In no case, however, shall such revocation have effect unless there is mailed to the petitioner's last known address a notice of the revocation and unless notice of the revocation is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States. If notice of revocation is not so given, and the beneficiary applies for admission to the United States, his admissibility shall be determined in the manner provided for by sections 1225 and 1226 of this title.

8 C.F.R. 206.1, in effect prior to December 1965,[1] provided in part:

> The approval of a petition made under [section] * * * 205 [now 204] of the Act * * * is

[1] The present (and renumbered) regulation, 8 C.F.R. 205.1, 30 Fed. Reg. 14775 (Nov. 30, 1965), as amended, 32 Fed. Reg. 6260 (April 21, 1967) reads in relevant part:

"The approval of a petition made under section 204 of the Act and in accordance with Part 204 of this chapter is revoked as of the date of approval if any of the following circumstances occur before the beneficiary's journey to the U.S. commences or, if the beneficiary is an applicant for adjustment of status to that of permanent resident, before the decision on his application becomes final:

"(a) *Relative petitions.* (1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

* * * * * * *

revoked as of the date of approval in any of the following circumstances:

* * * * *

(b) *Section 205* [now 204]. As to a petition approved under section 205 [now 204] of the Act:

(1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

* * * * *

QUESTION PRESENTED

1. Whether the regulation (8 C.F.R. 206.1(b)(1)),[2] providing for automatic revocation of the approval of a petition for preferred immigrant status upon formal notice of its withdrawal filed by the petitioning citizen spouse, is valid.

2. Whether, in the circumstances, petitioner was properly ordered deported for overstaying the authorized period of her visit.

STATEMENT

Petitioner, a citizen of Japan, was admitted to the United States as a visitor for pleasure for the six-month period from January 13 to July 12, 1965 (R. 24, 36).[3] On May 28, 1965 (within the authorized period) she married an American citizen. On June 14, 1965, her husband filed a petition with the Immigration and Naturalization Service to have her classi-

[2] See note 1, *supra*.

[3] "R." refers to the certified administrative record lodged with this Court.

fied as a preferred immigrant. The petition was approved on June 17. On July 13, 1965, petitioner instituted a divorce proceeding in a Tennessee circuit court alleging acts of mistreatment. Her husband requested the Service to withdraw his petition (R. 43). On July 29, 1965, the Service informed petitioner that, in view of her husband's withdrawal of the petition, she would have to depart the United States on or before August 27, 1965. Subsequently an extension of time was granted to October 27, 1965, to permit completion of the divorce proceeding. By letter to petitioner's counsel, the Service indicated that petitioner might request an additional extension on proof that the divorce action remained pending (R. 40, 43). No further requests for an extension of time were made. On December 17, 1965, the Service ordered petitioner to show cause why she should not be deported for having exceeded the authorized duration of her visit (R. 36). On January 28, 1966, new counsel for petitioner wrote the District Director at Atlanta that, because of illness, petitioner's former attorney had failed to request an extension of time beyond October 27, 1965, although the divorce proceeding was not yet completed. Counsel requested that the deportation hearing either be postponed or withdrawn to allow petitioner time to obtain her divorce (R. 42–46, 50–51). The District Director denied the requests but stated that, in the event petitioner was found deportable and ordered to depart before completion of the divorce action, consideration would then be given to staying the deportation order (R. 41).

At the deportation hearing on February 11, 1966, petitioner's counsel filed a formal motion seeking termination of the deportation proceeding and an extension of time for petitioner to remain in this country under the terms of her original visa. The motion also urged that the husband's action in withdrawing his petition to have petitioner classified as a preferred immigrant should be reexamined (R. 37–39). The Special Inquiry Officer denied the motion but indicated that, if petitioner were found deportable, he would consider the availability of discretionary relief (R. 21–22). Petitioner admitted the truth of the allegations contained in the order to show cause but denied deportability (R. 23–24). She also applied for the privilege of voluntary departure in lieu of deportation. The Special Inquiry Officer found petitioner deportable and denied her leave to depart voluntarily on both legal and discretionary grounds[4] (Pet. 26–28). Petitioner appealed the finding of deportability (but not the denial of voluntary departure) to the Board of Immigration Appeals. The Board affirmed the Special Inquiry Officer (Pet. 23–24), holding that, under applicable regulations, the withdrawal by the husband of the petition to have

[4] Petitioner admitted having committed adultery (R. 32–33) within the previous five years and was thus by law ineligible for the privilege of voluntary departure (Sections 101(f)(2) and 244(e) of the Act, 8 U.S.C. 1101(f)(2) and 1254(e) (1964 ed.)). In addition, petitioner had given a written statement on December 14, 1965, stating that she had entered this country to work, although she had told the consul that her purpose was to visit; and that she had married her husband, whom she did not love, for the purpose of remaining in the United States (R. 52–54).

petitioner classified as eligible for preferred status automatically resulted in revocation of the approval and rendered petitioner subject to deportation as an alien visitor who had overstayed her time. The Board noted that, under settled law, approval of a spouse's petition to have his or her alien spouse classified as a preferred immigrant conferred no right or status on the alien. The court of appeals affirmed *per curiam* (Pet. 21–22).

ARGUMENT

1. Petitioner contends that 8 C.F.R. 206.1(b)(1),[5] providing for the revocation of an approved petition for preferred immigrant status upon the withdrawal of the petition, is invalid on the grounds that it does not properly implement the underlying statute (Section 205 of the Act, 8 U.S.C. (Supp. II) 1155, *supra*, p. 2[6]), and that it violates due process and the Thirteenth Amendment (Pet. 10–18).

These arguments misconceive the limited purpose of the statute and the regulation. Congress has recognized that an American citizen who is married to an alien has an interest in obtaining permanent resident status for his or her alien spouse and has established a procedure for that purpose. The citizen must file a petition with the Immigration Service (Section 204 of the Act) seeking to have the alien classified as entitled to preferred status as the spouse of an

[5] Petitioner's assertion to the contrary notwithstanding (Pet. 4, 14), the present regulation (see note 1, *supra*) effects no substantial change from that cited above.

[6] Formerly Section 206 of the Act, 8 U.S.C. 1156 (1964 ed.).

American citizen under Section 201(b) of the Act, 8 U.S.C. (Supp. II) 1151(b).[1] When it is ascertained that the facts stated in the petition are true and that the alien beneficiary of the petition is entitled to preferred status, the petition is approved. In the usual case, when the alien spouse resides outside the United States, the approved petition is forwarded to the Secretary of State, who in turn authorizes the appropriate consular officer abroad to grant the alien a preferred immigrant visa. The alien then travels to a port of entry into the United States, where, if he passes immigration inspection, he is admitted for lawful permanent residence. Once permanent residence status has been acquired, a change of heart by the citizen spouse does not affect the alien's privilege to remain in the United States.

When the alien spouse who is the beneficiary of a citizen's petition is already present in this country, *e.g.*, on a temporary visitor's visa (as here), the alien spouse may seek adjustment of status to that of permanent resident (8 U.S.C. 1255 (1964 ed.)), without leaving the country.[2] A prerequisite for eligibility for that relief is that an immigrant visa be immediately available to the alien. An approved petition by the citizen spouse for classification of the alien as a preferred immigrant (because of the marital relationship) satisfies that prerequisite. Once adjustment of status is granted to the alien, and he (or she)

[1] Formerly Section 101(a)(27)(A) of the Act, 8 U.S.C. 1101(a)(27)(A) (1964 ed.).

[2] There are two exceptions, here irrelevant: the adjustment of status provision is by its terms inapplicable to alien crewmen and to natives of Western Hemisphere nations.

becomes a lawful permanent resident, a change of heart by the citizen spouse is similarly irrelevant to the alien's privilege to remain in the United States.[9]

In neither situation does the alien acquire any vested interest upon the mere approval of the petition filed by the citizen spouse, *i.e.*, before the status of lawful permanent resident has been accorded through admission to the United States or the grant of adjustment of status. All of the courts that have considered the question have so held, finding the regulation here at issue valid. See *Amarante* v. *Rosenberg*, 326 F. 2d 58 (C.A. 9); *Scalzo* v. *Hurney*, 225 F. Supp. 560 (E.D. Pa.), affirmed *per curiam*, 338 F. 2d 339 (C.A. 3), certiorari denied, 382 U.S. 849; *United States ex rel. Stellas* v. *Esperdy*, 366 F. 2d 266 (C.A. 2), vacated and remanded on other grounds, June 12, 1967 (see the government's Memorandum, No. 934 Misc., Oct. Term, 1966).

The crucial feature of the prescribed procedure is the desire of the citizen spouse to file a petition on behalf of the alien. Nothing in the immigration law requires a reluctant citizen spouse to file the petition, and Congress has not provided that an alien spouse may apply for preferential treatment independently. Under the statute, the alien spouse, prior to the grant of lawful permanent resident status, has a direct and protected interest, which he may assert in challenging the revocation of an approved petition, only when he has commenced his journey to the United States

[9] Petitioner did not apply for adjustment of status following approval of her husband's petition.

without notice of revocation—in which event his admissibility upon arrival is to be determined in the ordinary manner provided by other sections of the Act.[10] That this is the sole instance in which rights of the alien spouse under a visa petition are recognized reflects Congress' judgment that, until that point is reached, the right to obtain the statutory benefit is personal to the petitioning citizen spouse. Thus, the alien acquires no vested interest when a visa petition is first approved. See cases cited above.[11]

[10] Significantly, when Congress has intended to confer a benefit based on a family relationship enforceable by the alien, it has done so expressly. For example, the spouse, parent or child of a citizen who fraudulently procured admission to the United States is immunized from deportation solely by reason of the relationship, if he was otherwise admissible at the time of entry. Section 241(f) of the Act, 8 U.S.C. 1251(f); see *Immigration and Naturalization Service* v. *Errico*, 385 U.S. 214.

[11] Petitioner seeks to rely on that portion of Section 205 which provides that revocation shall not be effective unless "notice * * * is communicated * * * to the beneficiary of the petition before such beneficiary commences his journey to the United States" (see Pet. 12–16). But the quoted portion of the section is inapposite here; it is directed only to the alien who is abroad when the petition is filed and who journeys to this country in reliance upon the approval of the petition. In that situation, Congress felt that, even though the petition be revoked, the alien who relied upon its approval to the extent of traveling to the United States should be processed for admission notwithstanding the change. Neither the statute in terms, nor the reason underlying the provision (reliance) is applicable here, since petitioner was already in this country when she married a citizen, who then filed the petition. Obviously, in this circumstance, notice of revocation could never be communicated to the alien prior to embarkation for the United States (as petitioner's construction of the statute requires), because the petition was neither submitted nor approved until after petitioner had been in this country and had married a citizen.

The procedure established under Section 204, 8 U.S.C. (Supp. II) 1154, enables the citizen spouse to obtain preferential and expedited treatment for his (or her) alien spouse. If, prior to the alien's acquiring permanent resident status, the marital relationship is no longer viable from the standpoint of the citizen spouse, the Attorney General has determined (8 C.F.R. 206.1(b)(1)) that the reasons for that preferential treatment fail.[11] Viewed in light of the limited purpose of the statute, the regulation providing for revocation of an approved petition upon a formal withdrawal by the petitioning citizen spouse comports with the "good and sufficient cause" standard of Section 205, 8 U.S.C. (Supp. II) 1155, and satisfies the requirements of due process. See *Pacheco Pereira* v. *Immigration and Naturalization Service*, 342 F. 2d 422 (C.A. 1); *Scalzo* v. *Hurney, supra; Mantyk* v. *Sahli*, 161 F. Supp. 199 (E.D. Mich).

2. Petitioner contends that it was an arbitrary exercise of discretion for deportation proceedings to be instituted against her, since her lawyer, because of illness, failed to request an additional extension of time to enable petitioner to remain in this country pending completion of her divorce action. In view of the availability of discretionary relief following an adjudication of deportability, it was not an abuse of discretion for the Service to institute deportation

[11] We again stress that when the alien spouse perfects his (or her) permanent resident status, he is then fully protected as a lawful permanent resident, and his continued marital relationship with a citizen is no longer relevant, except, of course, if the marriage had been a sham (see Section 241(c) of the Act, 8 U.S.C. 1251(c) (1964 ed.)).

proceedings. Indeed, the Special Inquiry Officer indicated that he would consider a stay of deportation to allow completion of the divorce proceedings. That relief, however, was never sought. It ultimately proved unnecessary, since petitioner obtained her divorce prior to the argument in the court of appeals (see Pet. 22).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

SEPTEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967